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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

v.

TRUSTEES OF REX HOSPITAL, A CORPORATION; JOSEPH BARNES, GEORGE STOCKBRIDGE, AND RICHARD URQUHART, JR.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The citations to the opinions below are adequately set forth in the Petition (Pet. 1 and 2).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

QUESTION PRESENTED

Whether this Court should review the *en banc* decision of the Fourth Circuit Court of Appeals applying the well established and clear standards for interstate commerce jurisdiction under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, to the uncontested facts alleged in petitioner's amended Complaint, where the court below had, after a second review and argument, again affirmed dismissal of petitioner's amended Complaint.

STATUTES INVOLVED

The pertinent statutes are reproduced in the Petition (Pet. 4 and 5).

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust action concerning an alleged conspiracy which purportedly resulted in a four-month delay in the approval of petitioner's application *to expand* the facilities of Mary Elizabeth Hospital in Raleigh, North Carolina. Petitioner Hospital Building Company ("HBC") instituted this antitrust action against respondents on October 10, 1972, by filing its Complaint alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and seeking treble damages and injunctive relief pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26).

Petitioner HBC, a North Carolina corporation having its principal office and place of business in Raleigh, North Carolina, operates the Mary Elizabeth Hospital in Raleigh, North Carolina. (J. App. at 3; Compl. ¶ 3).[1]

[1] "J. App." refers to the joint Appendix to the Briefs submitted below on appeal which were filed by the parties with the Clerk of the Fourth Circuit Court of Appeals. "Compl." refers to the Complaint filed in this action by petitioner HBC.

Mary Elizabeth Hospital is a 49-bed hospital facility engaged in "offering general medical-surgical services to the public" for profit. (J. App. 3 and 6; Compl. ¶¶ 3 and 12.)

Respondent Trustees of The Rex Hospital ("Rex Hospital") is a public, non-profit, tax-exempt hospital located in Raleigh, North Carolina, and "offers general medical-surgical hospital services to the public in Raleigh, North Carolina." (J. App. 3; Compl. ¶ 4.) Respondent Joseph Barnes, a local resident of Raleigh, North Carolina, is the administrator of Rex Hospital; respondent Richard Urquhart, Jr., a local resident of Raleigh, North Carolina, is a member of the board of trustees of Rex Hospital; and respondent George Stockbridge, a resident of Durham, North Carolina, is an officer of the Health Planning Council for Central North Carolina. (J. App. 3 and 4; Compl. ¶¶ 5, 6 and 7.)

The Complaint alleges that pursuant to then effective North Carolina law,[1] petitioner, on November 4, 1971, applied to the North Carolina Medical Care Commission ("the Medical Care Commission"), a state agency, for a "Certificate of Need" approving the petitioner's planned expansion of the Mary Elizabeth Hospital, in Raleigh, North Carolina, from a 49-bed facility to a 140-bed facility. (J. App. 14; Compl. ¶ 17(C).) According to the "Certificate of Need Law," petitioner's application was referred to the Health Planning Council for Central North Carolina (the "Planning Council"), a local health

[1] Under the "Certificate of Need Law," Sections 90-289, *et seq.*, Title 21, General Statutes of North Carolina, any person that desired to increase the number of hospital beds or facilities in North Carolina was required to obtain a "Certificate of Need" approving the proposed increase from the North Carolina Medical Care Commission. (J. App. 12; Compl. ¶ 17(B).) The "Certificate of Need" Law has been declared unconstitutional under the Constitution of North Carolina by the North Carolina Supreme Court. *See, In re Aston Park Hospital,* 282 N.C. 542, 193 S.E. 2d 729 (S.Ct. N.C. 1973), a decision which may render moot much if not all of petitioner's case.

planning agency, for its recommendation. (J. App. 12, 14 and 15; Compl. ¶¶ 17(B) and (C).)

It is alleged that respondents Rex Hospital and its administrator and Wake County Hospital [1] and respondent George Stockbridge, a member of the Planning Council, conspired to and did in bad faith oppose petitioner's application before the Planning Council. As a result, the Planning Council entered a negative recommendation on petitioner's application with the Medical Care Commission. (J. App. 15 and 16; Compl. ¶ 17(C).)

On June 30, 1972, the Medical Care Commission approved petitioner's application, even though the Planning Council and respondent Rex Hospital, purportedly in furtherance of the alleged conspiracy, had appeared before the Medical Care Commission in opposition to petitioner's application. (J. App. 17-19; Compl. ¶¶ 17(D)-(F).) Neither the respondents nor any other person sought or obtained a stay of the Medical Care Commission's order granting petitioner's "Certificate of Need," and petitioner could have initiated its expansion of Mary Elizabeth Hospital on June 30, 1972. Petitioner admits that a "Certificate of Need" may not have been granted until March 1, 1972, even if petitioner's application were uncontested. (J. App. 26; Compl. ¶ 24.)

B. The Commerce Allegedly Restrained

The Complaint makes clear that the conduct complained of, the alleged conspiracy described above, was directed at and affected only the provision of *additional* hospital services by Mary Elizabeth Hospital in the "Raleigh area," defined in the Complaint as "Wake County, in the State of North Carolina" (J. App. 5; Compl. ¶ 9). In Count I of its complaint, petitioner alleges that respondents engaged in a "conspiracy in

[1] Wake County Hospital System, Inc., is organized under the laws of the State of North Carolina. (J. App. 5; Compl. ¶ 8(A).)

unreasonable restraint of the . . . trade and commerce in the furnishing of medical-surgical hospital services." (J. App. 9; Compl. ¶ 15.) In Count II, petitioner alleges that the conduct complained of constitutes "an attempt by defendant [respondent] Rex to monopolize and to conspire . . . to attempt to monopolize, the paid hospital business . . . in the Raleigh area." (J. App. 27; Compl. Count II, ¶ 3.)

It is alleged that the effect of the conduct complained of was "to prevent and restrain competition in the furnishing of *additional* medical-surgical hospital services to the public. . . ." (J. App. 24; Compl. ¶ 18; emphasis added) and to delay petitioner "from proceeding with construction of the additional medical-surgical hospital beds. . . ." (J. App. 25; Compl. ¶ [illegible]) The alleged illegal acts and the product market affected thereby were all geographically limited to Wake County. (J. App. 5, 7 and 8; Compl. ¶¶ 9 and 13.)

C. Proceedings in the District Court and Court of Appeals

On January 2, 1973, respondents, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, filed motions and supporting memoranda to dismiss for lack of subject matter jurisdiction. Petitioner, on January 29, 1973, filed a detailed factual amendment to the jurisdictional allegations of its Complaint (J. App. 39-45; Amended Compl. ¶ 14).

Respondents filed an amendment to their motions to dismiss and oral argument was scheduled and held on February 22, 1973, in the Raleigh Division of the Federal District Court for the Eastern District of North Carolina. On March 23, 1973, the District Court entered its order granting respondents' motions to dismiss, and stating: ". . . the conduct of defendants [respondents] complained of in this case directly affects only a local activity of plaintiff [petitioner] and only incidentally and insub-

stantially does it affect interstate commerce." (Pet. D-3 to D-4.)

Upon appeal by petitioner, the United States Court of Appeals for the Fourth Circuit, on February 6, 1974, affirmed *per curiam* the order of the District Court. (Pet. C-1.) On June 11, 1974, the Fourth Circuit Court of Appeals granted petitioner's application for a rehearing *en banc* and withdrew its prior opinion. (Pet. B-1.)

After submission of supplemental briefs and oral argument, the court below sitting *en banc* again affirmed dismissal of petitioner's Complaint. The court below found that the conduct complained of did not occur in interstate commerce. (Pet. A-6.) Contrary to petitioner's suggestion (Pet. 2), the dissent below specifically approved the finding of the majority that the alleged restraint on petitioner's provision of hospital services in Raleigh, North Carolina, did not occur in interstate commerce. (Pet. A-16 n.2.)

The majority of the court also found that the conduct complained of did not have a substantial effect on interstate commerce. (Pet. A-9 to A-10.) This determination was reached after a practical analysis of the effect of the alleged anticompetitive conduct on the flow of commerce. (Pet. A-12 to A-13.)

ARGUMENT

A. The *En Banc* Decision Was Correct and Presents No Important Federal Question or Conflict with Other Decisions

The *en banc* decision of the court below expressly applied the well-established and clear guidelines for jurisdiction under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2:

> An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the conduct, though wholly intrastate, had a substantial *effect on* interstate commerce. (Pet. A-5; emphasis in original.)

Those jurisdictional guidelines were succinctly set forth and followed in *Burke* v. *Ford*, 389 U.S. 320, 321 (1967), where this court, citing *United States* v. *Employing Plasterers' Assn.*, 347 U.S. 186 (1954), stated that "[I]t is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce (emphasis in original)."[1] The application of those jurisdictional guidelines in the *en banc* decision below is in harmony with prior decisions of the Fourth Circuit and other circuits.[2]

Nowhere in the Petition is it contended that the *en banc* decision below applied incorrect guidelines for determining jurisdiction under Sections 1 and 2 of the

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[1] In *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, —— U.S. ——, 95 S. Ct. 392, 398 (1974), the Court recently affirmed the vitality of the "substantially affects commerce" guideline, stating ". . . however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of § 1 [Sherman Act] if it substantially and adversely affects interstate commerce." *Accord, Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948); *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 297 (1945); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 230 (1947); *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949).

[2] *See, e.g., Greenville Publishing Co., Inc.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 395 (4th Cir. 1974); *United States* v. *Bensinger Company*, 430 F.2d 584, 588 (8th Cir. 1970); *Marston* v. *Ann Arbor Property Man. Ass'n.*, 302 F.Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, —— F.2d ——, Vol. 5 CCH Trade Reg. Reptr. ¶ 60,251 (10th Cir. April 7, 1975); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964); *Yellow Cab Co. of Nevada* v. *Cab Emp., Auto & W., Local 881*, 457 F.2d 1032 (9th Cir. 1972).

Sherman Act, 15 U.S.C. §§ 1 and 2. Instead, petitioner argues that the result reached by the court below is different than the result reached by other courts in actions concerning alleged conspiracies to restrain the provision of hospital services and in other cases, and therefore, the *en banc* decision below conflicts with those other decisions.

Petitioner misses the point. "The judicial inquiry" relating to interstate commerce jurisdiction under Sections 1 and 2 of the Sherman Act "turn[s] . . . on the circumstances presented in each case and require[s] a particularized judicial determination. . . ." (*Gulf Oil Corp.* v. *Copp Paving Company, Inc.*, —— U.S. ——, 95 S. Ct. at 399 n.12.) Or as stated in *Rasmussen* v. *American Dairy Association*, 472 F.2d 517, 526 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973), a case relied upon by petitioner: "In this area perhaps more than most each case must turn on its own facts."[1]

The Petition conspicuously avoids setting forth the substance of the Complaint allegations. In the instant case, it must be emphasized that petitioner has alleged the purported conspiracy was directed at the "furnishing of medical-surgical hospital services" offered by Mary Elizabeth Hospital, and the attempt or conspiracy to monopolize was directed at "the paid hospital business . . . in the Raleigh area," which is geographically limited by the Complaint to Wake County "in the State of North Carolina." (J. App. 5, 9 and 27; Compl. ¶¶ 9, 15 and Count II, ¶ 3.) The effect of respondents' alleged illegal conduct has been "to prevent and restrain competition in the furnishing of *additional* medical-surgical hospital services to the public . . ." in the Raleigh area

[1] This same approach was adopted by the *en banc* decision below (Pet. A-8) and emphasized by the court in *St. Bernard General Hospital, Inc.* v. *Hospital Service Association*, —— F.2d —— (5th Cir. April 7, 1975), (No. 74-2186), (Pet. E-1, at E-11).

and to prevent petitioner from proceeding with construction of the *additional* medical-surgical hospital beds. . . ." (J. App. 24-25 Compl. ¶¶ 18 and 19; emphasis added.)

Petitioner does not and cannot contend that the alleged foregoing effects were accomplished by a conspiracy directed at and intended to regulate the supplies, equipment, financing or any other commercial activity incidental to and separable from the furnishing of hospital services by Mary Elizabeth Hospital in the Raleigh area. Petitioner alleges only that the alleged restraint was perpetrated by respondents' purported conspiratorial opposition to petitioner's application for a Certificate of Need before the Medical Care Commission.

Applying the clear guidelines for jurisdiction under Sections 1 and 2 of the Sherman Act to the Complaint allegations, the court below analyzed the conduct complained of and correctly found that the Complaint allegations failed to meet the "in commerce" guidelines. (Pet. A-6.) The dissenters below expressly approved the majority's determination that the alleged conspiracy to restrain the provision of hospital services by Mary Elizabeth Hospital did not operate "in commerce." (Pet. A-16 n.2.)[1]

In determining that the conduct complained of failed to satisfy the "in commerce" guideline, the court below correctly analyzed the alleged target at which the purported conspiracy was directed or aimed. (Pet. A-6.)

[1] *Accord, Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic and Hospital for Poor Children* v. *Cleere*, 197 F.2d 125 (10th Cir. 1952); *Riggall* v. *Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson* v. *Lull*, 145 F. Supp. 134 (N.D. Ill. 1956); *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F. Supp. 103 (D. Ore. 1950); *Nankin Hospital* v. *Michigan Hosiptal Service*, 361 F. Supp. 1199 (E.D. Mich. 1973); *Jackson* v. *American Medical Assn.*, 1967 Trade Cases ¶ 71,992 (S.D. Cal. 1967).

This approach has been followed by this Court [1] and by circuit courts as well.[2]

Contrary to petitioner's interpretation (Pet. 10), the court below did not find, as a matter of law, that the provision of hospital services is a "purely local activity," but scrutinized petitioner's Complaint allegations and determined:

> Here, no matter how entwined in our increasingly national economy Mary Elizabeth and other Raleigh area hospitals may be, the fact remains that the conspiracy complained of directly affected only one aspect of those hospitals' businesses, namely the provision of surgical-medical hospital services in the Raleigh area. And the provision of such services remains what it always has been: a local, intrastate activity, not interstate commerce. (Pet. A-6.)

Indeed, the court below expressly agreed with *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973), implicitly indicating that, given facts sufficient to satisfy the jurisdictional requirements of the Sherman Act, it would also find jurisdiction under the

[1] *See, e.g., United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) (where this Court looking to the object or purpose of the alleged conspiracy (the commerce "toward which this aspect of the conspiracy is directed" (*Id.* at 230)), found it lacked jurisdiction under the Sherman Act); and *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 297 (1945) (where this Court stated ". . . [L]ocal conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce").

[2] *See, e.g., Yellow Cab Co. of Nevada* v. *Cab Emp. Auto. & W., Loc. 881*, 457 F.2d 1032, 1035 (9th Cir. 1972); *Marston* v. *Ann Arbor Property Man. Assn.*, 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Spears Free Clinic and Hospital* v. *Cleere*, 197 F.2d 125, 127 (10th Cir. 1952); *Page* v. *Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

Sherman Act over an alleged conspiracy to restrain hospital services. (Pet. A-10.)

The court below also correctly found that the conduct complained of could not have a substantial effect on interstate commerce. Quoting from *Rasmussen* v. *American Dairy Association*, 472 F.2d 517, 523 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973), the court below observed that ". . . such decisions should be exercises of reasoned economic judgment rather than applications of mechanistic formulae. . . ." (Pet. A-9.) Applying its "reasoned economic judgment" (Pet. A-9) to the Complaint allegations, it held:

> . . . [W]e conclude that the various ramifications noted by HBC do not add up to a sufficiently substantial effect upon interstate commerce to satisfy Sherman Act requirements. The effect here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce. Although not controlling, this factor is relevant to the issue of substantiality. [Citation omitted.] Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets, it is obvious that none of them could have more than negligible impact. . . . (Pet. A-9 to A-10; footnotes omitted.)

The court below emphasized the facts in the instant case concerned ". . . one small hospital's *delayed* expansion. . . ." (Pet. A-11; emphasis added.) The Complaint allegations make clear that petitioner was successful in obtaining approval from the Medical Care Commission to expand Mary Elizabeth Hospital in Raleigh, North Carolina, that from the date petitioner filed its application, November 4, 1971, until petitioner obtained approval, June 30, 1972, only eight months elapsed, and that approval by the Medical Care Commission would

not have been granted until March 1, 1972, even if respondents had not contested petitioner's application. Accordingly, the four-month delay in obtaining approval for the expansion of Mary Elizabeth Hospital could have no substantial adverse effect on interstate commerce in the travel of potential out-of-state patients or the supply of drugs and equipment or any other incidental contact Mary Elizabeth Hospital had with interstate commerce.

In addition, precedent squarely holds that each of the incidental out-of-state transactions with which Mary Elizabeth Hospital has contact is insufficient to satisfy the "substantial effects" guideline. *See, United States* v. *Oregon Medical Society*, 343 U.S. 326, 338-39 (1950), *aff'g*, 95 F.Supp. 103 (D. Ore. 1950) (where this Court affirmed a finding of lack of jurisdiction over an alleged local conspiracy to restrain competition in health insurance which conspiracy was formed by a statewide society of doctors who purchased drugs and equipment from out-of-state, treated patients from out-of-state and obtained insurance payments from out-of-state, 95 F. Supp. at 122-23); *Lieberthal* v. *North Country Lanes*, 332 F.2d 269 (2d Cir. 1964) (where the alleged local conspiracy was aimed at limiting the competition in bowling by preventing the construction of a bowling alley which was to be constructed with out-of-state materials and equipment); *Marston* v. *Ann Arbor Property Man. Ass'n.*, 302 F.Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970) (where the alleged local continuing conspiracy was directed at controlling and fixing the construction and rents of apartments in Ann Arbor which were leased to out-of-state travelers and built with out-of-state materials).[1]

[1] *See also, Spears Free Clinic and Hospital* v. *Cleere*, 197 F.2d 125, 126 (10th Cir. 1972); *Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, —— F.2d ——, Vol. 5 CCH Trade Reg. Rptr. ¶ 60,251 (10th Cir. April 7, 1975) (No. 74-1496); *Elizabeth Hospital* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Harrison* v. *Prather*, 435 F.2d 1168, 1175-76 (5th Cir. 1970); *Cotillion Club* v. *Detroit Real Estate Board*, 303 F. Supp. 850 (E.D. Mich. 1964).

Throughout the Petition, it is argued that the *en banc* decision construed the applicable jurisdictional standards too narrowly. (Pet. A-15.) Petitioner ignores the fact that after the court found Sherman Act jurisdiction lacking under the well established two-pronged guidelines, it went on to ". . . consider instead the real danger, in a practical sense, of anticompetitive conduct to the flow of commerce, or the potential destructive power of a conspiracy." (Pet. A-12.)

Under the foregoing analysis of the effect of the conduct complained of on the "flow of interstate commerce," an analysis which the petitioner contends was not made (Pet. 16), the *en banc* decision found:

> In our case, there is no allegation that the Raleigh Group has the power to put HBC out of business, or indeed, upon a fair reading of the whole amended complaint, that *it can do any more than delay, at most*, whatever expansion seems economically wise to the plaintiff. (Pet. A-13; emphasis added.)

Petitioner also suggests, as it did before the court below, that the "outcome of this case will determine" whether "hospitals are exempt from the Sherman Act." (Pet. 12.) Again, petitioner misses the point of the judicial determination of jurisdiction under the Sherman Act. Such determination is dependent upon the circumstances in each case and is a particularized judicial determination. *See, Gulf Oil Corp.* v. *Copp Paving Company, Inc.*, —— U.S. ——, 95 S.Ct. at 399 n.12 (1974). In agreeing with *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia, supra*, the court below indicated that, given

the proper factual circumstances, jurisdiction would be found. (Pet. A-10.) Accordingly, this case is not similar, as petitioner claims (Pet. 23), to *Goldfarb* v. *Virginia State Bar, et al.*, 497 F.2d 1 (4th Cir. 1974), *cert. granted*, 419 U.S. 963 (1974) (Dkt. No. 74-70), where the circumstances involve the novel question of the exemption of alleged professional price fixing of fees by local associations of a "learned profession" in the multi-state area surrounding metropolitan Washington, D.C.

Petitioner also argues that "the federal government has a vital interest in the provision of hospital services" because it indirectly provides some funds to local agencies for in-state Medicare payments and, therefore, the conduct complained of substantially affects interstate commerce. (Pet. 22.) If this were the test for Sherman Act jurisdiction, virtually every walk of life has some connection with the Federal bureaucracy and would be within reach of the Sherman Act. State antitrust laws, such as North Carolina's antitrust laws (G.S. North Carolina, §§ 75-1, *et seq.*, (Michie 1975 Replacement)), should then be repealed as ineffective. *See, Cotillion Club, Inc.* v. *Detroit Real Estate Board*, 303 F.Supp. 850, 853-54 (E.D. Mich. 1964).

Contrary to petitioner's assertion (Pet. A-12), the *en banc* decision is not in conflict with *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973). As the *en banc* decision observed (Pet. A-10 to A-11), the facts in *Doctors, Inc., supra*, are vastly different from the facts in the instant case. The alleged conspiracy in *Doctors, Inc., supra*, was directed at the provision of hospital services furnished by approximately 100 hospitals in an interstate geographic market consisting of eight counties located in Pennsylvania and New Jersey (490 F.2d at 49, n.1 and 51), and the effect of the conspiracy would have been to close down Doctors Hospital and "to close down or limit the operation" of approximately 100 other hospitals at which the conspiracy was aimed. (490 F.2d at 51.)

Likewise, the *en banc* decision is not in conflict with *St. Bernard General Hospital, Inc.* v. *Hospital Services Association of New Orleans, Inc.*, —— F.2d —— (5th Cir. April 7, 1975) (Pet. E-1). The Fifth Circuit in *St. Bernard, supra*, discussed the *en banc* decision below and emphasized the significant factual differences between *St. Bernard, supra*, and the *en banc* decision below. (Pet. E-9 to E-10.)[1] The Fifth Circuit in *St. Bernard, supra*, specifically stated that "We do not consider our disposition to be in conflict with the very recent *en banc* opinion by the Fourth Circuit in *Hospital Building Co.* v. *Trustees of the Rex Hospital*, 4th Cir." [footnotes omitted], and commented with approval that "the Fourth Circuit affirmed the dismissal of a single small hospital's Sherman Act complaint for lack of jurisdiction." (Pet. E-9 to E-10, footnotes omitted.)

Nor is the *en banc* decision in conflict with *Rasmussen* v. *American Dairy Association*, 472 F.2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973). As the *en banc* decision emphasized, the facts in *Rasmussen* were not at all similar to the facts in the case below and involved a conspiracy aimed at restraining the sale of a product that was in the flow of interstate commerce. (Pet. A-7.) *See also* 472 F.2d at 525.

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[1] In *St. Bernard*, plaintiff initiated a class action on behalf of itself and nine other hospitals in the New Orleans area against the nine remaining hospitals in the New Orleans area and Blue Cross of New Orleans, alleging defendants had conspired to impose discriminatory health insurance contracts on plaintiff and the class members, which contracts prevented plaintiff and the class from earning a profit on Blue Cross business. (Pet. E-4.) The complaint contained no allegations as to the effect of the alleged conspiracy on interstate commerce (Pet. E-6) and the Fifth Circuit did not find Sherman Act jurisdiction but merely remanded the case for further proceedings.

Petitioner also argues that the *en banc* decision below conflicts with *Burke* v. *Ford*, 389 U.S. 320 (1967) and *United States* v. *Employing Plasterers' Assn.*, 347 U.S. 186 (1954). (Pet. 18.) The facts in those cases underscore the lack of jurisdiction in the instant case. In *Burke* v. *Ford*, this Court applying the "substantial and direct" guideline found Sherman Act jurisdiction existed where all the liquor wholesalers in the state conspired to allocate territories for the sale of liquor, *all* of which liquor sold in the state was shipped into the state from other states. 389 U.S. at 320-21.

And, in *United States* v. *Employing Plasterers' Ass'n.*, *supra*, the Court found jurisdiction present where a labor union and a trade association of contractors, which contractors did 60% of the plastering contract business in Chicago, conspired "to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors" without union approval. (347 U.S. at 188.) The Court stated: "A local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate" commerce. (347 U.S. at 189.) *See also, A. Cherney Disposal Co.* v. *Chicago & Suburban Refuse Disposal Ass'n.*, 484 F.2d 751, 753, n.1 (7th Cir.), *cert. denied*, 414 U.S. 1131 (1973) (another case with which petitioner claims the *en banc* decision below conflicts (Pet. 20), but where plaintiff alleged defendants refuse collectors, their trade association and out-of-state equipment manufacturers had conspired "to restrain and monopolize the private scavenger business within the geographic area including Chicago, its suburbs, parts of Indiana, and Wisconsin . . . and St. Joseph, Missouri," and where defendants allegedly pressured out-of-state equipment manufacturers to refuse to deal with plaintiffs).

The *en banc* decision dismissing the amended Complaint allegations simply measured those allegations against the well established jurisdictional guidelines for Sherman Act jurisdiction. There is no conflict in decisions nor important fundamental issue raised by the *en banc* decision.

B. The *En Banc* Decision Correctly Affirmed Dismissal of the Action on the Amended Complaint Allegations

The *en banc* decision correctly affirmed dismissal of the action on the basis of petitioner's amended Complaint allegations. Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure specifically contemplate such action and the case authority is legion on the correctness of this dismissal for failure to state a claim or for lack of jurisdiction over the subject matter under the Sherman Act.[1]

After having respondents' memorandum in support of its motion to dismiss for approximately four weeks, petitioner filed a detailed factual amendment to the jurisdiction allegations in its Complaint. (J. App. 39-45;

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[1] *See, e.g., Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, —— F.2d ——, Vol. 5 CCH Trade Reptr. ¶ 60,251 (10th Cir. April 7, 1975) (No. 74-1496); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Riggall* v. *Washington County Medical Society*, 249 F. 2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson* v. *Lull*, 145 F.Supp. 134 (N.D. Ill. 1956); *Jackson* v. *American Medical Association*, 1967 Trade Cases ¶ 71,992 (S.D. Cal. 1967); *Marston* v. *Ann Arbor Property Managers Assn.*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F. 2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F. 2d 269 (2nd Cir. 1964); *Hotel Phillips, Inc.* v. *Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd*, 301 F. 2d 443 (8th Cir. 1962); *Evanston Cab Co.* v. *City of Chicago*, 325 F. 2d 907 (7th Cir.), *cert. denied*, 377 U.S. 943 (1963); *United States* v. *Yellow Cab Co.*, 322 U.S. 218 (1947); *Yellow Cab Co. of Nevada* v. *CAB Employers, Automotive & Warehousemen, Local 881*, 457 F. 2d 1032 (9th Cir. 1972).

Amended Compl. ¶ 14.) Respondents' memorandum in support of their motions to dismiss made petitioner fully aware of the jurisdictional defects in its Complaint. Petitioner had more than ample opportunity to present facts to satisfy the Sherman Act's jurisdictional requirements.

It is clear from the Transcript of the hearing before the District Court that petitioner intended that the facts in its amended Complaint be conclusive with respect to jurisdiction under the Sherman Act, and that those allegations constituted the totality of the purported interstate commerce affected by the conduct complained of.[1] Moreover, the Transcript of the hearing is barren of any suggestion that petitioner had need of discovery to allege sufficiently the jurisdictional requirements of the Sherman Act.

In affirming dismissal, the *en banc* decision made clear that its decision to affirm dismissal on the Complaint allegations was a "rare exception." (Pet. A-3.) Thus, the court below was aware that the facts in the instant case were clearly insufficient to satisfy the Sherman Act jurisdictional requirements.

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[1] Petitioner stated to the District Court:

> We have amended our complaint to set forth in substantial detail the facts which we intend to prove with respect to the involvement of interstate commerce because we felt that we'd like to move forward in this case and get to the merits of it and we would like the Court to have before it as soon as possible the facts that we felt justifies this Court in exercising its jurisdiction to deal with this particular situation, as we see it, this particular anti-competitive situation that we feel violates the Sherman Act.
>
> We have set forth the various facts which we believe satisfy both the tests Mr. Bolze has referred to. (Transcript before the District Court, Civil No. 4048, February 22, 1973, at p. 26.)

CONCLUSION

The practice of this Court has been to grant writs of certiorari only in cases involving either principles of fundamental importance or a direct conflict in circuit court opinions. Respondents respectfully submit that the instant Petition presents no important questions of Federal Law or conflict of decisions calling for settlement by this Court. The Petition for writ of certiorari should be denied.

Respectfully submitted,

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